International Union of Elevator Constructors, Local 2 *and* Kone, Inc. and Architectural & Ornamental Iron Workers, Local 63 and Joint Conference Board. Case 13–CD–760

May 31, 2007

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Kone, Inc. (the Employer) filed charges on December 18, 2006, alleging that International Union of Elevator Constructors, Local 2 (Elevator Constructors) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Elevator Constructors rather than to employees represented by Architectural & Ornamental Iron Workers, Local 63 (Ironworkers). The hearing was held on February 7 and 8, 2007, before Hearing Officer Helen I. Gutierrez. Thereafter, the Employer and Elevator Constructors each filed a posthearing brief,[1] and Ironworkers filed a brief in support of its position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.[2] On the entire record, the Board makes the following findings.[3]

I. JURISDICTION

The parties stipulated that the Employer is a corporation with an office and place of business in Chicago, Illinois, where it is engaged in the business of selling and servicing elevators and escalators. They also stipulated that during the past calendar year, the Employer purchased and received goods at its facility in Chicago, Illinois, valued in excess of $50,000 directly from points located outside the State of Illinois. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Finally, the parties stipulated, and we find, that Elevator Constructors and Ironworkers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is in the business of manufacturing, installing, repairing, modernizing, and maintaining elevators, escalators, and related equipment throughout the United States. The Employer is signatory to a collective-bargaining agreement with Elevator Constructors, effective by its terms from July 9, 2002, to July 8, 2007. Pursuant to the collective-bargaining agreement, the Employer is required to and has a longstanding practice of employing employees represented by Elevator Constructors to install elevator door frames and related materials.[4] Article IV(A) of the collective-bargaining agreement provides that, for disputes concerning modular systems, the jurisdiction of Elevator Constructors "shall remain intact as outlined in the latest 'Green Book' or 'Plan for Settling Jurisdictional Disputes, Nationally & Locally'. . . "[5] Additionally, article XV sets forth the grievance procedure for all disputes within the jurisdiction of the agreement, which agreement does not mention the Local Plan or the Joint Conference Board (JCB). Article XIV is a no-strike clause.

The Employer has never had a bargaining relationship with Ironworkers.

Effective January 2, 2005, the Trump Organization (d/b/a "401 North Wabash Venture LLC"), serving as owner/developer, together with the Chicago Building Trades Council, entered into a project labor agreement (the PLA) "for and on behalf of contractors and subcontractors performing work within the scope of this agreement." The PLA, covering all applicable work performed at the Trump Tower, 401 N. Wabash Ave., Chicago, Illinois (the Trump Tower), contains a no-strike clause. Additionally, it requires that all jurisdictional disputes be resolved in accordance with the procedures of the "Plan for the Settlement of Jurisdiction Disputes In the Construction Industry" (the Plan), which implicates

[1] Elevator Constructors' unopposed motion to correct typographical error in its posthearing brief is granted.

[2] The Employer contends that the hearing officer improperly granted the Joint Conference Board's petition to intervene. In view of our finding below that the Employer is not bound by the project labor agreement, a finding in accord with the Employer's position and contrary to the Joint Conference Board's position, we find it unnecessary to address the Employer's contention.

[3] The Employer's unopposed motion to correct the record is granted.

[4] Art. IV §§ 2(b), (m), and (v) of the collective-bargaining agreement provides that the Employer shall assign the following work to employees represented by Elevator Constructors: "the erecting and assembling of all elevator equipment…"; "The hanging of all automatic or semiautomatic elevator hoistway doors, together with installation of hangers and tracks"; and "Landing door entrances."

[5] The uncontested testimony of E. James Walker, a member of the multiemployer association of elevator companies, was that art. IV(A) deals with modular systems buildings, which consists of offsite building construction and preassembly. The uncontested testimony of the Employer's vice president, John Reece, was that the work in dispute was not a modular systems project.

the jurisdiction of the JCB. Further, the PLA provides that it supersedes all other national or local collective-bargaining agreements, but provides an exception to preserve the work jurisdiction of International Union of Elevator Constructors on the project. Both Elevator Constructors and Ironworkers are signatories to the PLA. The Employer is not a signatory and did not agree to abide by it.

On March 4, 2005, the Employer entered into a subcontract with the general contractor, Bovis, to install 26 elevators at the Trump Tower. The subcontract does not mention the PLA, and it includes a merger clause specifying that the contract constitutes the entire agreement between the parties.[6] After executing the subcontract, the Employer assigned the work to employees represented by Elevator Constructors.

Thereafter, by letter dated December 6, 2006,[7] Ironworkers claimed that employees it represents were entitled to perform the installation of the elevator door frames. By letter dated December 14, representatives of the Chicago & Cook County Building and Construction Trades Council informed the Employer that an arbitration hearing had been scheduled. By letter dated December 15, the business manager for Elevator Constructors, Frank Christensen, threatened the Employer that it would "take all necessary action to protect our work assignment, including, but not limited to, striking your company." On December 18, the Employer filed the instant charge against Elevator Constructors.

Pursuant to the JCB grievance procedure, an arbitration hearing was held on December 27. The Employer refused to participate in the arbitration, claiming it was not a signatory to the PLA and was therefore not bound by its terms. The arbitrator issued his decision on December 28, finding that the Employer was bound by the PLA and awarding the installation work to employees represented by Ironworkers.

B. Work in Dispute

The parties stipulated that the work in dispute is the installation of elevator door frames and related material, including off-loading, handling, hoisting, and installation of the sill, sill supports, struts, header, door jamb/buck, door frame and fascia at the Trump Tower.

C. Contentions of the Parties

Ironworkers contends that the notice of hearing should be quashed because the parties are bound to an agreed-upon method for the voluntary adjustment of the dispute by virtue of the PLA, namely arbitration under the auspices of the JCB.[8] Ironworkers also contends that aticle IV(A) of the Employer's collective-bargaining agreement with Elevator Constructors incorporates the National Plan and the JCB, and that, even if not, the collective-bargaining agreement is superseded by the PLA. Further, Ironworkers contends that the Bovis subcontract's failure to incorporate the PLA was inadvertent error.[9] Finally, Ironworkers contends that the Board should defer to the December 28 arbitration award, and that, as a third-party beneficiary to the PLA, the Employer was required to arbitrate the dispute. On the merits, Ironworkers contends that the work should be awarded to employees it represents based on the factor of interunion agreements and decisions.

The Employer asserts that this dispute is properly before the Board inasmuch as it has not agreed to be bound by the PLA. The Employer contends that there is reasonable cause to believe that Elevator Constructors violated Section 8(b)(4)(D) of the Act, and that the work in dispute should be awarded to the employees represented by Elevator Constructors based on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, and relative skills.

Elevator Constructors contends that the Employer has properly assigned the work to employees it represents. In so contending, Elevator Constructors relies on the same factors as the Employer.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of em-

[6] The merger clause provides:

> The Contract constitutes the entire agreement between the parties. No representations of other agreements have been made other than as set forth in the contract. The Contract may not be amended or any term or provision waived except in writing signed by the Owner. Without limitation, no term or provision of the Contract may be amended or waived by conduct of the parties.

[7] All dates hereinafter refer to 2006, unless otherwise provided.

[8] Ironworkers makes several arguments in support of its contention that the Employer is bound to the PLA. It contends that the express terms of the PLA granted the Trump Organization actual authority to sign on the Employer's behalf. Ironworkers contends alternatively that the Trump Organization had apparent authority to sign on the Employer's behalf, because the Trump Organization led third parties to believe that it had the authority to do so, and because this authority does not have to be expressly given by the Employer.

[9] Ironworkers contends that, before the Employer signed the Bovis subcontract, Employer representatives were told that the subcontract incorporated the PLA.

ployees;[10] (2) a party has used proscribed means to enforce its claim to the work in dispute;[11] and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[12] On this record, we find that this standard has been met.

1. Competing claims for work

We find that there are competing claims for the work here in dispute. Elevator Constructors has at all times claimed the work in dispute for the employees it represents, and these employees have been performing the work. Further, Ironworkers has claimed the work in dispute by virtue of the December 6 letter, described above.

2. Use of proscribed means

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As described above, in its December 15 letter to the Employer, Elevator Constructors threatened to take "all necessary action to protect our work assignment, including, but not limited to, striking your company," in the event that the Employer assigned the disputed work to employees represented by Ironworkers.

3. No voluntary method for adjustment of dispute

We further find, contrary to Ironworkers' contention, that the Employer is not bound to the provisions contained in the PLA, and, accordingly, that there is no agreed-upon method for the voluntary adjustment of the dispute to which all parties are bound.

Ironworkers contends that the Employer is bound to the PLA because the Trump Organization signed the PLA on the Employer's behalf. This contention rests on two theories. First, Ironworkers contends that the Trump Organization had actual authority to sign the PLA on behalf of the Employer, because the terms of the PLA indicate that the Trump Organization signed "for and on behalf of the contractors and subcontractors performing work within the scope of [the PLA]." Second, Ironworkers contends that the Trump Organization had apparent authority to sign the PLA on behalf of the Employer, because Ironworkers' business manager relied on the Trump Organization's representation of authority to act on behalf of the Employer when he decided to sign the PLA. We find no merit to these contentions.

It is well established that: (1) actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him; and (2) apparent authority results from a manifestation by a principal to a third party that another is his agent.[13] Here, with respect to actual authority, Ironworkers presented no evidence that the Employer manifested agency authority directly to the Trump Organization. Further, with respect to apparent authority, Ironworkers presented no evidence that the Employer manifested to a third party that the Trump Organization was its agent. Instead, Ironworkers relies solely on representations made by the Trump Organization. Representations by the putative agent, however, do not constitute evidence of agency status.[14] We find, therefore, that the Trump Organization did not have actual or apparent authority to sign the PLA on behalf of the Employer. Accordingly, we find that the Employer is not bound by its terms.

We disagree with Ironworkers' contention that either the Employer's subcontract from Bovis or the Employer's collective-bargaining agreement with Elevator Constructors binds the Employer to the PLA or to the procedures of the JCB. The Employer's subcontract does not mention the PLA or the JCB. To the contrary, the subcontract states that it "constitutes the entire agreement between the parties."[15] Additionally, the Employer's collective-bargaining agreement does not incorporate the National Plan or the JCB with respect to the work in dispute. As noted above, the provision of the collective-bargaining agreement that incorporates those dispute resolution mechanisms applies only to modular systems, and the uncontested testimony of the Employer's vice president establishes that the Trump Tower is not a modular system.

Ironworkers also contends that the arbitrator's decision binds the Employer to the PLA. As noted above, the Employer was not a party to the proceeding and did not agree to be bound by its results. Accordingly, we conclude that the Employer is not so bound.[16]

[10] *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001).

[11] See, e.g., *Electrical Workers, Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

[12] *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB No. 94, slip op. at 3–4 (2005).

[13] Restatement 2d, Agency, § 27; see *Tyson Fresh Meats, Inc*., 343 NLRB 1335, 1336 (2004).

[14] See *Precipitator Services Group*, *Inc.*, 349 NLRB No. 77, slip op. at 5 (2007).

[15] Although Ironworkers presented testimony contradicting the merger clause contained in the subcontract, it is of no avail to Ironworkers. Where an agreement is unambiguous, as in the instant case, "Board precedent prohibits the use of parol evidence to vary the terms of the parties' agreement." *Contek International*, 344 NLRB No. 109, slip op. at 6 (2005) (citing *Quality Building Contractors*, 342 NLRB 429, 430 (2004); and *NDK Corp*., 278 NLRB 1035 (1986)).

[16] See, e.g., *Elevator Constructors Local 1 (Elevator Industries Assn.)*, 229 NLRB 1200, 1202 (1977). We also find no merit to Ironworkers' contention that the Employer accepted certain benefits of the PLA (specifically, the PLA's no-strike clause and its provision requiring all jurisdictional disputes to be resolved in accordance with the Plan), and in so doing bound itself to the PLA as a third party beneficiary. Contrary to Ironworkers' contention, the record does not show that

We, therefore, find that the record does not show that there is an agreed-upon method for the voluntary adjustment of the dispute.[17]

Based on the foregoing, we find that there are competing claims for the disputed work, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination and deny Ironworkers' motion to quash the notice of the hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors.[18] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case.[19]

Based on the following factors, which we find are relevant to determining this dispute, we conclude that the Employer's employees represented by the Elevator Constructors are entitled to perform the work in dispute.

1. Certification and collective-bargaining agreements

There is no evidence of a Board certification concerning the employees involved in this dispute.

The evidence shows that the Employer has a collective-bargaining agreement with Elevator Constructors that encompasses elevator door installation work. Article IV of this agreement provides that employees represented by Elevator Constructors will be assigned all work involving "erecting and assembling of elevator equipment," "hanging of all automatic or semiautomatic elevator doors," and "installation of landing door entrances."

The Employer is not a signatory to an Ironworkers collective-bargaining agreement. Ironworkers presented testimony that it has a collective-bargaining agreement with Door Systems, Inc., a subsidiary of the Employer. However, this testimony is unavailing because no such collective-bargaining agreement has been entered into evidence.[20] Accordingly, we find that the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by Elevator Constructors.

2. Employer preference and past practice

Employer Vice President John Reece testified that the Employer prefers to assign the work in dispute to employees represented by Elevator Constructors. Reece further testified that the Employer has a 20-year practice of assigning similar work to employees represented by Elevator Constructors, with only one exception, the McCormick Place Expansion Project (the McCormick Project), in 2004. Reece testified that, on that project, the Employer was bound to a project labor agreement through provisions in its subcontract with the general contractor and by an arbitration decision that awarded the work in dispute to employees represented by Ironworkers. This sole exception does not outweigh the Employer's stated preference and 20-year past practice. Accordingly, we find that the factor of Employer preference and past practice favors an award of the work in dispute to employees represented by Elevator Constructors.

3. Area and industry practice

Representatives of three large elevator companies, Otis Elevator Company, Schindler Elevator Company, and Thyssen-Krupp Elevator Company, testified that the elevator industry utilizes employees represented by Elevator Constructors to perform the work in dispute, and that they could not recall a single instance in which employees represented by Ironworkers performed the work. In contrast, Eric Dean, Ironworkers' former business agent, testified that the disputed work was performed by employees represented by Ironworkers on "more than one occasion," but was unable to identify any specific projects where Ironworkers had performed the work outside of New York. We find that, on balance, the factor of area and industry practice favors an award of the work in dispute to employees represented by Elevator Constructors.

4. Relative skills

Both unions provided testimony that they offer their members complete 4-year training programs in elevator door-front installation and safety, and that their members receive extensive on-the-job training performing such installations.

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the Employer has ever accepted any of the so-called benefits of the Plan, as evidenced by the dispute at hand.

[17] See *Laborers (Eshbach Brothers, LP)*, 344 NLRB No. 4, slip op. at 3 (2005) (quoting *Nickelson Industrial Service*, 342 NLRB 954, 955 (2004) ("In order for an agreement to constitute an agreed-upon method for the voluntary adjustment, all parties to the dispute must be bound to that agreement.")).

[18] *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961).

[19] *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

[20] See, e.g., *Electrical Workers Local 211 (United Technicians)*, 276 NLRB 512, 514 fn. 9 (1985) ("no weight can be attached to an agreement unless it is before the Board"), enfd. 821 F.2d 206 (3d Cir. 1987).

Reece testified that employees represented by Elevator Constructors receive additional training, entitled the "Kone methodology." According to Reece, this involves training employees to install door frames and set up the entrances for Kone elevators. Reece's testimony, however, did not establish, and Elevator Constructors presented no other evidence, that the "Kone methodology" provides employees represented by Elevator Constructors greater skills than the training offered by Ironworkers' program. In the absence of any such evidence, we find that employees represented by Elevator Constructors and Ironworkers both possess the skills and training to perform the disputed work, and that this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency of operations

Reece testified that employees represented by Elevator Constructors run the elevator platforms, and that, while performing the disputed work, they also work simultaneously on multiple tasks with respect to the elevators and the platforms. Reece further testified that, if the work is assigned to employees represented by Ironworkers, those employees would have to wait for employees represented by Elevator Constructors to finish various tasks on the platform before they could complete the work in dispute. Therefore, the record shows that it is more efficient for employees represented by Elevator Constructors to perform the work in dispute, as this work may be carried out in conjunction with other tasks, as opposed to the employees represented by Ironworkers, who would be otherwise idle while certain other tasks are performed.[21] Accordingly, we find that the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Elevator Constructors.

6. Interunion agreements and awards

Ironworkers introduced a "Green Book" from 1931, amended in June 1984, in which Ironworkers and Elevator Constructors agreed that employees represented by Ironworkers shall perform all work involving "elevator doors or gates manually operated" and that Elevator Constructors shall perform all work involving "[a]ll semi or full automatic doors or gates." Daniel Baumann, the business agent for Elevator Constructors, testified that the work in dispute involves automatic elevator doors, not doors manually operated.

Ironworkers also introduced into evidence the arbitrator's decision, dated December 28, awarding the work in dispute to Ironworkers-represented employees. As noted above, the Employer neither participated in nor was a party to the arbitration proceeding, because it is not a signatory to the PLA. The Board does not give dispositive weight to arbitrator's decisions where the employer is not a party to the proceeding and did not agree to be bound to its results. See, e.g., *Automotive Trades District Lodge 190 (Sea-Land Service)*, 322 NLRB 830, 835 (1997); see also *Laborers Local 1086 (Detinger, Inc.)*, 282 NLRB 633, 635 (1987) (rejecting argument that arbitration awards were binding in a 10(k) proceeding where not all the parties to the proceeding participated in the arbitrations or agreed to be bound by the results).

Further, Ironworkers submitted into evidence an October 13, 2005 arbitration decision, in the McCormick Project, whereby similar work was awarded to employees represented by Ironworkers. As noted above, the subcontract in that project bound the Employer to the applicable project labor agreement that assigned similar work to employees represented by Ironworkers. Here, the Employer's subcontract for the Trump Tower Project does not incorporate the PLA. We therefore accord the October 2005 arbitration award no significant weight.

Additionally, Ironworkers contends that the JCB has awarded similar work to employees represented by Ironworkers, and not to employees represented by Elevator Constructors, in several instances in the past. However, Ironworkers did not introduce any such awards into evidence.

We find that this factor does not favor awarding the disputed work to either group of employees.

Conclusions

After considering all of the relevant factors, we conclude that employees represented by Elevator Constructors are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, and economy and efficiency of operations.

Scope of Award

Elevator Constructors and the Employer request that the Board issue a broad award covering all of the Employer's future work in Chicago, Illinois.

"The Board customarily declines to grant an areawide award in cases in which the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work." *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). See also *Laborers (Paul H. Schwendener, Inc.)*, 304 NLRB 623, 625 (1991). Because Elevator Constructors is the charged party in this

[21] See, e.g., *Teamsters Local 505 (Sandblasting Co.)*, 240 NLRB 960, 963 (1979).

case, and because the Employer contemplates continuing to assign this work to employees represented by Elevator Constructors, we shall limit the present determination to the work jurisdiction dispute that gave rise these proceedings.

DETERMINATION OF THE DISPUTE

The National Labor Relations Board has made the following Determination of Dispute.

Employees of Kone, Inc., represented by International Union of Elevator Constructors, Local 2, are entitled to perform the installation of elevator door frames and related material, including off-loading, handling, hoisting, and installation of the sill, sill supports, struts, header, door jamb/buck, door frame and fascia at the Trump Tower, 401 N. Wabash, in Chicago, Illinois.

Dated, Washington, D.C. May 31, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD